1963

Sherman V. Lund v. Mountain Fuel Supply Co. : Brief of Respondent

Utah Supreme Court

Milton A. Oman; Attorney for Appellant;
John Crawford, Jr.; Kastier & Crawford; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

SHERMAN V. LUND,
Plaintiff-Appellant,

— vs. —

MOUNTAIN FUEL SUPPLY COMPANY,
Defendant-Respondent.

Case No. 9835

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

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STATEMENT OF KIND OF CASE

This is an action for alleged property damage arising out of a break of respondent's gas pipeline near appellant's home.

DISPOSITION IN LOWER COURT

Upon the close of the appellant's evidence, defendant moved for dismissal on the grounds that appellant had failed to sustain the burden of proof. The trial court granted this motion and denied appellant's later motion to reopen.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's order of dismissal.

STATEMENT OF FACTS

Respondent accepts the facts as stated by appellant, but wishes to point out that the gas line in question was located in 7100 South Street, a public street in Bountiful, Utah (T 5). The gas line was laid at a depth of 39 inches in that street (T 8), and the respondent immediately came to the area upon notice of the break (T 52). Also, appellant raises the issue of the pre-trial order, *for the first time,* upon this appeal.

ARGUMENT

POINT I

THE APPELLANT'S EVIDENCE WAS NOT SUFFICIENT TO JUSTIFY SUBMISSION OF THE CASE TO THE JURY UNDER THE DOCTRINE OF RES IPSA LOQUITUR.

On August 22, 1962, a pre-trial conference was held in this matter, and on September 20, 1962, the appellant's counsel submitted a pre-trial order which stated, among other things, that respondent had exclusive management and control over the gas lines in question (R 5). On the following day, the respondent submitted an objection to the pre-trial order. On September 28, 1962, the pre-trial order was signed by the court without notice or hearing upon respondent's objection and denial of exclusive man-

agement and control. Appellant now claims to have relied upon this provision of the pre-trial order although appellant's counsel was no doubt aware of the trial court's inability to make such a substantive finding in a pre-trial order absent stipulation or admission. Action of appellant's counsel at the trial further belies such reliance, as he attempted, unsuccessfully, to prove the exclusive control requisite to invoking the aid of the doctrine of res ipsa loquitur. Appellant's counsel endeavored to show exclusive management and control by calling as his own witness a Mr. Makin, an employee of respondent, and questioning him at considerable length on the matter (T 4-11). The trial judge recognized this failure of proof and without the aid of the doctrine, appellant's case failed.

In effect, the pre-trial order as it related to exclusive management and control, was improperly signed to begin with, was ignored by appellant's counsel at the trial and was thus amended at trial. Failure to formally amend the pre-trial order is not error under such circumstances and particularly where the court admits evidence to the same extent as if the order had been so formally amended (3 Moore's Federal Practice 1132) and such informal amendment is necessary to prevent manifest injustice (*Maryland Casualty Co. v. Rickenbaker,* CCA 4, 1944, 146 Fed. 2d 751). In this case, appellant tried but simply failed to prove that a pipeline laid at a depth of 39 inches in a public street and accessible not only to the general public but also to owners and constructers of other underground pipelines and structures, was in the exclusive con-

trol of respondent. Had appellant really relied upon the defective pre-trial order, such an endeavor of proof of exclusive control and management would have been totally unnecessary.

In the case of *Musolino Le Conte Co. v. Boston Consol. Gas Co.* (Mass. 1953) 112 NE2d 250, the plaintiff sued for damage resulting from gas escaping on the plaintiff's premises. The plaintiff proved that the gas came from a broken or cracked valve in defendant's main line which was located in the street immediately outside of the plaintiff's premises. The plaintiff relied on the doctrine of res ipsa loquitur, alleged ownership, and control of the main by the defendant. The Supreme Judicial Court of Massachusetts in sustaining the defendant's directed verdict stated:

> "The law of this Commonwealth does not go so far as to allow an inference of negligence in a case such as this. * * * There have been a number of cases against gas companies founded upon negligence in allowing the escape of gas from street mains, but in all of them, as we understand the reports, there was evidence of negligence in addition to the mere fact of the break and escape of gas, and all of them were treated as cases involving the question of negligence upon all the evidence without attaching peculiar significance to the mere facts of a break and a leak."

The court further stated:

> "The company has control of its pipes only in a limited sense. They are buried often under thick pavement, in miles of streets of which the com-

pany does not have control. They cannot be continuously dug up for inspection."

In commenting on the doctrine of res ipsa loquitur, this court in the case of *Matievitch v. Hercules Powder Company,* 3 Utah 2d 283, 282 P.2d 1044, held that the doctrine of res ipsa loquitur did not apply in explosion cases unless the thing that exploded was in the exclusive control of the defendant. Also, this court has held the doctrine of res ipsa loquitur will not apply merely because the gas itself is under the exclusive management and control of the gas company; otherwise, the doctrine could be made to apply against the supplier of gas in any case of injury resulting therefrom regardless of the amount of control or the kind of care exercised over them by others. (*Wightman v. Mountain Fuel Supply Company,* 5 Utah 2d 373, 302 P.2d 471).

The doctrine of res ipsa loquitur was specifically made an issue of law in the pre-trial order. Such an issue is to be determined by the court and was found not to be applicable as a pipeline laid in a public street is not subject to the exclusive control of the owner.

POINT II

THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE APPELLANT TO REOPEN HIS CASE.

Appellant in his brief states that the case was based solely upon the negligence or lack of negligence of the respondent in causing or allowing the gas to leak from

its main (T 10). We agree with this statement. To establish negligence on the part of the respondent, the appellant had the burden of proving that the break in the line was due to the respondent's lack of proper degree of care to prevent the escape of gas or to remedy the defect after notice thereof. The appellant's evidence and all reasonable inferences to be drawn therefrom does not show a lack of due care on the part of the respondent nor does it show failure to remedy any defect after receiving notice. For these reasons the court granted the respondent's motion to dismiss at the close of the appellant's evidence (T 86). After the motion had been granted, the appellant moved to reopen for the purpose of adducing additional testimony on the question of negligence. In support of his motion to reopen, the appellant made an offer of proof (T 90-91). In this offer the appellant stated that he was prepared to show that while the main line was within the boundaries of a public street, it was not within the traveled portion of the street; that part of the cover over the line was removed (not stating how or by whom), leaving the line 16 inches below the surface; that there were no inspections since the line was laid in 1947, and that the line was under the dominion of the respondent. The appellant did not state why he did not present this evidence in his case in chief, nor did he complain that his failure to so do might have been because of his now claimed reliance upon the pre-trial order. This offered evidence was cumulative and no valid reason being offered for not presenting it earlier, the trial court denied the motion to reopen (T 91). This was certainly

within the discretion of the court and proper under the circumstances.

In the case of *Bowen v. Olson,* 2 Utah 2d 12, 268 P. 2d 983, this court in commenting on the trial court's refusal of permission to reopen stated:

> "The refusal of the trial court to grant a motion of the plaintiffs to reopen to present additional evidence, after he had rendered his decision, was well within his discretion."

We submit that the same is true in this case in which the appellant moved to reopen after the court had granted respondent's motion to dismiss, and did not raise the issue of the pre-trial order as an excuse or reason for reopening.

The trial court's order of dismissal should be affirmed.

Respectfully submitted,

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